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CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF:
TORTURE AND DETENTION

Letter dated 12 March 1999 from the Permanent Representative of the Republic of Cuba to the Secretary of the Commission on Human Rights

I am addressing myself to you to seek your cooperation in ensuring that effective action is taken to comply with the request contained in my note of 24 July 1998 to the Chairman/Rapporteur of the Working Group on Arbitrary Detention, and repeated on 11 February of the current year, that the reply by the Government of Cuba to Opinion No. 1/1998 be reproduced in the report of the Working Group on Arbitrary Detention (E/CN.4/1999/63/Add.1).*

(Signed): Carlos AMAT
Ambassador
Permanent Representative

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* The annex is reproduced in English, French and Spanish only.

ANNEX

1. The Cuban authorities note with satisfaction certain elements contained in Note G/SO 218/2 MS and in the text of "Opinion No. 1/1998" itself, namely:

(a) The sober, measured and respectful tone which generally characterizes both documents.

(b) The express reference, at the start of the "Opinion", to the fact that Cuba is not a party to the International Covenant on Civil and Political Rights and - even more importantly - that "opinions" issued in respect of Cuba should therefore not be based on the provisions of the said Covenant.

(c) The fact that the Group saw fit to recognize expressly:

- "the deprivation of liberty of the persons [referred to in the case] may be considered to be in conformity with [Cuban] national legislation" ("Opinion", para. 14);
- "the full and timely cooperation of the [Cuban] Government" (ibid., para. 5);
- its appreciation to the Government "for having supplied the requested information in a timely manner" (ibid., para. 2);
- the description of "full and detailed" warranted by the meticulous reply given to its request for information on the case in question (ibid., para. 7); and
- "the deprivation of liberty of the persons [referred to in the case] may be considered to be in conformity with [Cuban] national legislation" (ibid., para. 14).

2. The Cuban authorities consider that the Group has in fact acted in accordance with its mandate, inasmuch as this is indeed an instance of detention (or remand in custody) in a case in which no enforceable sentence has yet been passed.

3. On the other hand, however, they are puzzled by the Working Group's statement (para. 4) that "guided by a spirit of cooperation and coordination" it decided "to take into account [in rendering its 'Opinion' in this case] the report prepared by the Special Rapporteur on Cuba in accordance with Commission on Human Rights resolution 1997/62" (E/CN.4/1998/69).

4. It seems inexplicable, at first sight, that the Group should have taken into account as the basis for its opinion a document which, after having been defended in extenso by the Special Rapporteur before the Commission last April, received no endorsement whatsoever from that body.

5. Moreover, it should be pointed out that in a roll-call vote this year the Commission absolutely defeated the usual draft resolution which the United States has presented year after year since 1991 on the so-called "situation of human rights in Cuba".

6. In the operative part of this draft resolution the Commission would have commended "the Special Rapporteur for his report and his efforts to carry out his mandate ..." (para. 3), decided to extend the said mandate for one more year (para. 11) and called upon the Government of Cuba "to carry out the recommendations contained in the report of the Special Rapporteur ..., in particular [those relating to] the detention and imprisonment ... of ... human rights defenders and others who are engaged in the peaceful exercise of their rights ..." (para. 8).

7. In rejecting the said draft resolution, the only action taken by the Commission in 1998 with regard to the Special Rapporteur and the contents of the above-mentioned report was merely to decide not to extend Mr. Groth's mandate, to refuse to accept his recommendations, and to refrain from making any positive judgement of his work. The Commission's decision was therefore clear, simple and straightforward.

8. However, what is most striking about the Working Group's decision to take account, in drafting its "Opinion", of a report not approved by the Commission, is that this defeated text invited "the Special Rapporteur and the existing thematic mechanisms of the Commission to cooperate fully and exchange information and findings on the situation of human rights in Cuba" (para. 13, emphasis added).

9. "Opinion No. 1" was adopted by the Group on 13 May 1998, that is to say over three weeks after the rejection of the preceding text by the Commission, and the Note addressed to the Permanent Representative of Cuba in Geneva was sent on 2 June of this year, i.e. more than six weeks after that vote. Neither document mentions the decision referred to above. It is reasonable to suppose that the Group was informed of what had taken place in the Commission on 21 April.

10. If that was the case, then the decision to take the report into account is obviously nonsensical, and borders on prevarication, in the strictest technical sense of the term.

11. If the "spirit of cooperation and coordination" invoked in paragraph 4 of the "Opinion" refers not to the Working Group's relations with the Government of Cuba, but rather to its links with the Special Rapporteur ousted by the Commission - given that for many years the resolution against Cuba contained an operative paragraph expressly involving the Working Group in the political machinations of the United States, through Mr. Groth - this is not a valid reason for the Group's interest in his report of this year.

12. But whatever ulterior motives the Group may have had for taking this document into account, the fact that it did so in itself gives rise to justified concern. The Group now seems inclined to revert to certain harmful attitudes which one might have thought had been somewhat calmed following the debates in the Commission in 1996, and which had historically led the Group to feel detached from the decisions of those bodies of which it is only a subordinate mechanism, and to act at its own discretion. As will be recalled, on repeated occasions between 1992 and 1996, the Cuban Government felt obliged to draw the Group's attention to this unacceptable attitude. The Government's strong reservations of yesterday today have equal, or even greater validity than in the past.

13. Turning now to the substance of the arguments put forward by the Group to justify its Opinion in the case of the detention of the four Cuban citizens referred to therein, the Cuban authorities apply very different criteria to those used by the Group in its conclusions.

14. To begin with, it is worth reiterating the views expressed in the past by the Cuban Government concerning the three categories that the Working Group uses to determine whether detention is "arbitrary"; these are repeated in paragraph 3 of the "Opinion" rendered in this case.

15. It is worth mentioning, in this connection, its unconditional agreement with category I; its acceptance of category II provided that the deprivation of liberty that has been ordered is in breach of its national legislation and its formally contracted international legal obligations; and its acceptance, also conditional, of category III, provided that all the remedies allowed in

internal legislation to complain about such non-compliance with its national legislation and its international obligations (although not with non-binding standards) have been exercised and exhausted.

16. Furthermore, it is appropriate to point out that the Group seems to give central importance in its reasoning to the fact that the detainees did not resort to violence in the acts they are charged with having committed. In other words, they are supposedly accused of what in French legal language is known as an unacceptable "crime of opinion" (délit d'opinion). Moreover, the Group tacitly accepts the view held by Amnesty International that such a "non-violent attitude" is fundamental to the definition of a "prisoner of conscience".

17. The Group has apparently decided that only acts or omissions which directly or indirectly have an element of violence should deserve to be punishable in the world's criminal codes. It seems not to take account of the fact that in practically all legislations worldwide - including that of Cuba - there are offences defined as such which include an element of violence, and others in which no such element is present but which still constitute punishable offences. The Group also forgets that nothing in its mandate permits it to establish such an interpretation.

18. The Cuban authorities are firmly convinced - from Cuba's active participation in the work of the Commission, which in 1991 set up the Working Group - that the term "arbitrary" used to define the practical framework of the Group's mandate on detention has an indisputable meaning: actions or omissions contrary to internal law and/or to the legal obligations freely contracted by the State concerned, in the exercise of its sovereignty.

19. The Group already accepts that the provisions of the International Covenant on Civil and Political Rights cannot be applied to Cuba as legal obligations in the case under discussion. It likewise accepts that the "deprivation of liberty of the persons ... referred to may be considered to be in conformity with national legislation" (paragraph 14 of the "Opinion", emphasis added). The Group does not invoke any other human rights treaty or convention which contains provisions establishing obligations for Cuba which could have been violated in this case.

20. The only basis which the Group finds for considering the precautionary measure applied to the detainees in this case to be arbitrary is that "this

legislation [in force in Cuba] contravenes [sic] the provisions of articles 19 and 23 of the Universal Declaration of Human Rights" (paragraph 14 of the "Opinion", emphasis added).

21. The first point to be made about this reasoning is that the reference here (as also in paragraphs 12 and 15 of the "Opinion") is to article 23 of the 1948 Declaration. This provision quite obviously refers to the right of everyone to work, to non-discrimination in pay and to just remuneration ensuring an existence worthy of human dignity, and the right to form and join trade unions for the protection of his interests.

22. None of the foregoing, in the opinion of the Cuban authorities, has any bearing on the facts with which the Group is concerned in this particular case. This is presumably a substantive error which has crept into the text as received. The Group is duly requested to clarify this matter.

23. From the contents of paragraph 12 of the "Opinion" (which suggests that the conduct of the accused is related to their "political participation") it may be inferred that the reference is to article 21 of the Declaration, and not to article 23, as stated in the "Opinion". Assuming this to be the case, the competent Cuban authorities believe it is appropriate to make the following points.

24. Article 21 also quite obviously refers, in the part pertinent to the case in question, to the right of everyone to take part in the government of his country and to have equal access to public service in his country. Prior to their detention, the four accused persons were at no time deprived of the exercise of these rights as established in the electoral legislation in force in Cuba. Once the precautionary measure of detention was imposed and they were remanded in custody in a penitentiary establishment, it goes without saying that - as in any country of the world where a person is in the same situation - they did not participate in the elections of 1997 and 1998.

25. Those elections, moreover, served to ensure the implementation of the last part of this same article 21, through the fulfilment by the authorities of their legal duties to guarantee the exercise of the will of the people, which - as stated in article 21 - is the basis of the authority of government.

26. The last part of article 21 also states that the will of the people shall be expressed in periodic and genuine elections (not without them), and

that such elections shall be by universal and equal suffrage and by secret vote (as actually provided for by the Electoral Act in force in Cuba).

27. Since the corresponding court, in its turn, determined the charges to have been proven, it is difficult to find grounds for arguing that the actions in question, i.e. obstruction of the electoral process (or the "personal choice expressed in a peaceful manner for which the detainees were calling", as the Working Group prefers to style it), could favour the exercise by other citizens of the rights recognized in article 21.

28. The Cuban authorities always have difficulty with putting the safeguard of actions contrary to established legal institutions, carried out by a few individuals, before the right of the vast majority of citizens who do want to exercise the rights which the same institutional framework confers on them. This was demonstrated here by the results of the elections in 1997 and 1998.

29. The more serious objection we have to the reasoning used by the Group to justify its "Opinion No. 1 of 1998" arises from the contents of paragraphs 13 (b) (final part), 14 and 15. According to this reasoning, although the detention is in conformity with national legislation, it could constitute a violation of the recommendations in the Universal Declaration, and such an interpretation is considered sufficient by the Group to conclude that the detention is arbitrary.

30. This reasoning is absolutely and completely unacceptable for the Cuban authorities. In the first place, it presupposes that the value judgements of the Group have greater legal standing than the decisions issued by the Cuban national authorities, whether these be judicial, administrative or law enforcement bodies. It should be reiterated once more that at no time, either in giving its agreement in the Commission to the establishment of the Working Group, or subsequently during the performance of the tasks of that body, has Cuba ceded any aspect of its sovereignty.

31. Secondly, the reasoning used presupposes the equally unacceptable pre-eminence of a recommendatory document of the United Nations (whatever its value "as a common standard of achievement for all peoples and all nations", to quote the Preamble to the 1948 Declaration) over national legislation in force in any country. The United Nations is still very far from being a

universal parliament empowered to impose some kind of homogenizing standard on its Member States without their consent, in this or any other sphere.

32. In addition, the Group seems to forget (or not to see the relevance of applying) other provisions of singular value contained in the Declaration. Article 29, paragraph 2, of this text clearly indicates that the exercise of a right or freedom recognized therein is subject to the limitations necessary to secure the recognition and respect for the rights and freedoms of others (as already pointed out in paragraph 23 above).

33. Moreover, this same paragraph recognizes, logically, that national law and not the Declaration itself, can limit the exercise of these same rights and freedoms established in the text, on the basis, inter alia, of "the just requirements of ... public order". It is the national authorities, and not the Working Group, which decide, in Cuba, what these just requirements of public order are; and it is Cuban law, and not the Universal Declaration, which establishes what limitations are pertinent to this end.

34. Accordingly, the Cuban authorities do not consider that the current legislation in Cuba applicable to the case under examination is in contradiction with the provisions of the articles of the Universal Declaration invoked by the Group in its substantiation of its the "Opinion" rendered in this case.

35. For the above reasons, the Cuban authorities are of the view that "Opinion No. 1 of 1998" is clearly unfounded, and this view will inform its future action in this case.

36. With regard to what the Group requests the Cuban Government to do, in paragraph 16 of the "Opinion", the authorities wish to set out the following views:

(a) The first of these requests is considered inadmissible for the reasons given above regarding the basis of the "Opinion";

(b) The second is also inadmissible by reason of superfluity, inasmuch as the consideration of the possibility of Cuba becoming a State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto is an ongoing process; and

(c) The third may be deemed not pertinent, as such a request is not consistent with the Group's mandate, and it is also inadmissible by reason of superfluity, given the constant efforts of the Cuban Government not only to

achieve harmony in this sphere between its legislation and its international obligations, but also to effectively guarantee to all Cuban citizens (not just to a few, as in Cuba's political past) the effective realization (and not the mere enunciation in an abstract legal text) of the rights and freedoms established therein. In the final analysis, that is what is important.